Nebraska Law Review

Volume 57 | Issue 1 Article 9

1978

The Impact of Defining "Beneficial Use" upon Nebraska Water Appropriation Law: L.B. 149, 85th Leg., 1st Sess. (1977)

T. Edward Icenogle

University of Nebraska College of Law, eicenogle@isp-law.com

Note

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I. INTRODUCTION

Legislative Bill 149,[1] which would define the types of beneficial uses for which Nebraska stream water may be appropriated, is at the same time modest and ambitious. It is modest in that it is brief:

> As used in Chapter 46, article 2, Reissue Revised Statutes of Nebraska, 1943, and amendments thereto, beneficial use shall mean the use of water for domestic, livestock, municipal, irrigation, manufacturing, power, recreation, fish and wildlife, ground water recharge and storage, waste assimilation, navigation, and any other purpose having public value.[2]

The bill is also modest in that it provides no scheme of preferences as among the categories of beneficial uses,[3] and is mainly intended to merely focus legislative discussion on the uses to which remaining unappropriated Nebraska stream water should be put.[4] It is ambitious because it specifically recognizes as beneficial uses several uses heretofore unrecognized in Nebraska statute and case law, and generally recognizes "any other purpose having public value."[5] It may also be ambitious in that its proposed recognition of such uses

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1. L.B. 149, 85th Leg., 1st Sess. (1977). The bill was introduced by Senator Donald Dworak, 22nd legislative district. At the end of the session, L.B. 149 had not been advanced out of the Committee on Public Works. Worksheet, 85th Leg., 1st Sess. (June 7, 1977).
2. L.B. 149, 85th Leg., 1st Sess. (1977).
3. "It is not, and I cannot make this too clear, it is not an attempt to prioritize uses of water. In no way do I attempt to prioritize uses of water." *Hearing on L.B. 149 Before the Comm. on Public Works*, 85th Leg., 1st Sess. 31 (1977) (statement of Senator Donald Dworak). *See* note 10 *infra*, distinguishing uses of derivations of "priority."
4. "L.B. 149 is a very sincere and a very honest attempt to define and expand beneficial uses of water." *Id.*
5. *See* text accompanying note 2 *supra*.

as fish and wildlife, recreation, and navigation at least raises the possibility of in-stream appropriation of water.[6]

These latter ambitions, even though avoiding the controversial matter of preference-listing the competing uses of water, suggest that, should L.B. 149 be taken up in the 85th Legislature's second session or be reintroduced in a subsequent legislature, the bill may be the subject of some debate.

II. THE BENEFICIAL USE CONCEPT IN NEBRASKA

The adoption in 1920 of a series of state constitutional sections is the bedrock of the beneficial use concept in Nebraska water law. The constitution declares the necessity of water for domestic and irrigation purposes a "natural want,"[7] dedicates the use of the water of natural streams to the people "for beneficial purposes,"[8] and limits that dedication in certain ways.[9] Except when public interest otherwise requires, the right to divert unappropriated waters of streams "for beneficial use" is not to be denied a citizen.[10] Stated positively, appropriation is possible when the appropriator puts the water to a beneficial use. Although the constitution does not define "beneficial use," its sections recognize four uses of water:[11] domestic, agricultural, manufacturing,[12] and power generation.[13]

Nebraska statutes track the constitutional provisions and designate the State Department of Water Resources (DWR) as the agency which determines appropriation priorities.[14] In delegating

6. *See* notes 26-36 and accompanying text *infra*.
7. NEB. CONST. art. XV, § 4.
8. NEB. CONST. art. XV, § 5.
9. NEB. CONST. art. XV, § 6.
10. *Id.* Section 6 also sets forth the first-in-time, first-in-right doctrine of prior appropriation common to arid and semi-arid western states: "Priority of appropriation shall give the better right as between those using the water for the same purpose . . . ." Under this doctrine, "priority" refers to time and is to be distinguished from references in the hearing on L.B. 149 to "prioritizing" uses of water. As used in the hearing, "priority" apparently was used as synonymous with "preference." *See* note 3 *supra*.
11. NEB. CONST. art. XV, §§ 6-7. There is no constitutional language to suggest the specification of the four uses was intended to prohibit recognition of other uses of water.
12. NEB. CONST. art. XV, § 6.
13. NEB. CONST. art. XV, § 7. "Power purposes" are designated in section 7 as a "public use," which, unlike the three uses specified in section 6, are not to be alienated, but only leased or developed.
14. NEB. REV. STAT. §§ 46-209, 46-226 (Reissue 1974). Actually, the statutes preceded the constitutional enactments, with the statutory sections having been first passed by the 1919 legislature.

responsibility for determining priorities,[15] the legislature instructed the DWR: "All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases."[16] The legislature further requires that appropriators who wish to secure priority rights to stream water apply to the DWR and stipulate, *inter alia*, "the purpose for which water is to be applied."[17] But again, nowhere in the statutes is it stated what purposes are "beneficial uses" and therefore entitle the appropriators to a priority. L.B. 149 attempts to make such a statement.

III. L.B. 149'S NEW DIMENSION

In the process of defining "beneficial use" as a non-exhaustive list of purposes for which stream water may be appropriated, L.B. 149 appears to add a new dimension to that term as used in Nebraska water law. Its original dimension was described by the Nebraska Supreme Court: "While many elements must be considered in determining whether water has been put to beneficial use, one is that it shall not exceed the least amount of water that experience indicates is necessary in the exercise of good husbandry for the production of crops."[18] From this limited definition of "beneficial use," which is the only one in Nebraska law, it is clear that the court's focus was on stating a test for determining how much water can be *beneficially* used,[19] and not on what types of uses may be considered beneficial. The emphasis on quantity has not been uncommon in judicial discussion of beneficial use, and may be responsible for the term's flexible and rather vague meaning.[20]

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15. *Id.*
16. NEB. REV. STAT. § 46-229 (Reissue 1974).
17. NEB. REV. STAT. § 46-233(2)(g) (Reissue 1974).
18. Enterprise Irr. Dist. v. Willis, 135 Neb. 827, 832, 284 N.W. 326, 329 (1939).
19. For a discussion of this original dimension of "beneficial use," see Fischer, Harnsberger & Oeltjen, *Rights to Nebraska Streamflows: An Historical Overview With Recommendations*, 52 NEB. L. REV. 313, 351 (1973).
20. The flexibility of the concept, as well as the emphasis on quantity, is represented by the language of the California Supreme Court:

> [I]t should be stated that, whatever quantity an appropriator has actually diverted in the past, he gains no right thereto unless such water is actually put to a reasonable beneficial use. . . . What is beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great

The focus of L.B. 149, however, appears to be on what types of uses are *capable of being beneficial*, and therefore deserving of appropriation priorities. If L.B. 149 is enacted, the term "beneficial use" would thus have two dimensions in Nebraska law.

Although not defining "beneficial use,"[21] the Nebraska constitution and statutes implicitly recognize as beneficial uses domestic, agricultural, and manufacturing applications of waters of natural streams.[22] Also implied as a beneficial use is the application of water to generation of power.[23] Beyond this, however, little guidance has been provided the DWR for determining what uses of stream water are to be deemed beneficial and deserving of an appropriation priority.[24] The legislature has simply directed the DWR to approve an appropriation priority application "[i]f there is unappropriated water in the source of supply named in the ap-

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scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 567, 45 P.2d 972, 1007 (1935).

21. "Beneficial use" has almost never been defined by case or statute. In 1971 Washington broke the tradition: "Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial." Wash. Rev. Code Ann. 90.54.020(1).

F. TRELEASE, CASES AND MATERIALS ON WATER LAW 49 (2d ed. 1974).

22. NEB. CONST. art. XV, § 6; NEB. REV. STAT. § 46-204 (Reissue 1974). The implicit recognition of these three uses as beneficial may be found in the constitutional and statutory ranking in preference of these uses when water supply is short. If these uses are not beneficial, they would be deserving of no preference.

23. NEB. CONST. art. XV, § 7; NEB. REV. STAT. § 46-236 (Reissue 1974).

24. In many states, while an explicit definition of "beneficial use" has been lacking, the courts have found various uses entitled to appropriations:

> On the whole, in deciding appropriation questions, the courts have held many different uses of water to be beneficial.
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> In the earlier court decisions, esthetic and recreational considerations were no more acceptable as the basis of a valid appropriation of water than as the basis of a riparian right. . . . In recent years, however, the importance of recreation as a beneficial use of water has been recognized in some of the statutes, and provision for recreational facilities has become an important feature of large water project developments.

1 R. CLARK, WATERS AND WATER RIGHTS 89-90 (1967) (footnotes omitted).

plication, and if such application and appropriation when perfected is not otherwise detrimental to the public welfare."[25] This rather minimal requirement of nondetriment suggests the legislature has not considered "beneficial use" a term of art, but rather a vague standard for agency discretion. This suggestion is borne out in the approach apparently taken by the DWR in executing its duties in regard to appropriation of stream water. Appropriation priorities have been granted for purposes besides the uses recognized in the constitution and statutes (domestic, agricultural, manufacturing, and power).[26] Of course, in some cases more definite categorization would not be particularly helpful to either the DWR or the prospective appropriator; some appropriations of water are put to more than one beneficial use. A single dam project, for example, may at the same time prevent flooding, conserve soil, supply water for irrigation, and provide recreation and habitat for wildlife.

The inclusive list of beneficial uses recognized in L.B. 149[27] and the general provision of "any other purpose having public value," apparently would not require the DWR to cease granting appropriation priorities to uses it has previously recognized. Nor would the standard of nondetriment to public welfare be altered. To the contrary, the real issue of L.B. 149 may lie in how greatly it would expand the categories of beneficial use for which appropriation priorities may be obtained.

Clearly, L.B. 149 would remove most doubts about what is to be deemed in law and by the DWR as beneficial uses of water, at least in the second-dimensional sense of what uses are capable of being beneficial. Especially, the bill would remove concern, if any exists, that existing law can be construed to restrict the ranks of beneficial uses to the four categories presently enumerated in the constitution and statutes.[28] But, for whatever it may settle, L.B. 149 gives rise to a significant uncertainty: Does the bill allow in-stream appropriation of water?

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25. NEB. REV. STAT. § 46-235 (Reissue 1974).
26. In its most recent listing of existing appropriation priorities, the DWR had among its approved uses "cooling," "steam," and "storage." DEPT. OF WATER RESOURCES FORTY-FIRST BIENNIAL REPORT TO THE GOVERNOR OF NEBRASKA 1975-76. Comparison with previous reports indicated "storage" is a catch-all label for uses formerly designated separately ranging from soil conservation to recreation.
27. *See* text accompanying note 2 *supra*.
28. *See* note 11 and accompanying text *supra*.

IV. DIVERSION OR IN-STREAM APPROPRIATION

At common law, man-made diversion of water from its streambed, in addition to an intention to apply the water to some beneficial use and actual application within a reasonable time, has been considered a necessary element for appropriation.[29] However, some courts have held that the requirement of man-made diversion is dispensable in a proper case.[30] Such a proper case has been found where nature is already doing the job that a diversion structure would accomplish, by, for example, periodically flooding a river.[31] But, the courts have not on their own gone so far as to find a valid appropriation where no diversion, either man-made or natural, has occurred; that is, they have not recognized in-stream use of water for recreation, navigation, fish and wildlife and so forth as a beneficial use which allows an appropriation priority.[32]

What the courts have not themselves done, however, the legislatures of at least two states have. Colorado has enacted into law two changes which allow in-stream appropriation of water. One removes from the statutory definition of "appropriation" any reference to diversion: " 'Appropriation' means the *application* of a certain portion of the waters of the state to beneficial use."[33] The other provides that the state may appropriate water to maintain minimum stream flows.[34] A significant difference between these

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29. As a general rule, to constitute a valid appropriation of water, three elements must exist: (1) An intent to apply it to a beneficial use, existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, canal, or other structure; and (3) an application of it within a reasonable time to some useful industry.

In re Rights to Use of Waters in Silvies River, 115 Or. 27, 64-65, 237 P. 332, 336 (1925). *Accord*, Walsh v. Wallace, 26 Nev. 299, 67 P. 914 (1902); Reynolds v. Miranda, 83 N.M. 443, 493 P.2d 409 (1972).

30. It is not necessary in every case for an appropriator of water to construct ditches or artificial ways through which the water might be taken from the stream in order that a valid appropriation be made. The only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use.

Genoa v. Westfall, 141 Colo. 533, 547, 349 P.2d 370, 378 (1960).

31. *In re* Rights to Use of Waters in Silvies River, 115 Or. at 66, 237 P. at 336.

32. Colorado River Water Conserv. Dist. v. Rocky Mountain Power Co., 158 Colo. 331, 406 P.2d 798 (1965).

33. COLO. REV. STAT. § 37-92-103(3) (1973) (emphasis added).

34. COLO. REV. STAT. § 37-92-103(4) (1973) provides:

"Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropri-

two Colorado statutes appears to be that while any otherwise qualified person may undertake an in-stream appropriation of Colorado water by applying (not diverting) it to a beneficial use, only the state may appropriate for the sole purpose of maintaining minimum stream flows for environmental preservation.

By a combination of statute and judicial construction, Idaho has also achieved in-stream appropriation of water. In 1971, the Idaho legislature directed the State Department of Parks to appropriate for the state's citizens the waters of a canyon, for the purpose of preserving its scenic beauty and recreational value, and declared that purpose a beneficial use.[35] The Idaho Supreme Court upheld the statute, despite a constitutional reference to diversion,[36] holding that diversion of water is not necessary for a valid appropriative right.[37]

Clearly, L.B. 149 as it now reads would not go as far in changing the law as did the Colorado statutes. In comparison, while it could be argued that under L.B. 149 minimum stream flow is a "purpose having public value,"[38] and is therefore a beneficial use, such an intent is far from evident in the Nebraska bill's language. Also, no procedure comparable to that of the Colorado law[39] is provided for securing minimum stream flow. Most importantly, L.B. 149 does not strike from the statutes explicit reference to diversion,[40] as was the case in Colorado. This factor casts considerable doubt on the bill's ability to create in-stream appropriation of water. The fact that L.B. 149 includes as beneficial uses such items

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> ation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife. For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

35. IDAHO CODE § 67-4307 (Cum. Supp. 1977).
36. IDAHO CONST. art. 15, § 3: "The right to *divert* and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . ." (Emphasis added).
37. State Dept. of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974).
38. *See* note 2 and accompanying text *supra.*
39. *Id. See* note 34 *supra.*
40. "The right to *divert* unappropriated waters of every natural stream for beneficial use shall never be denied . . . ." NEB. REV. STAT. § 46-204 (Reissue 1974) (emphasis added).

as recreation, fish and wildlife and navigation[41] does not necessarily overcome this third point, because each of these uses may be served by lake and pond impoundments (which do have diversion structures). By this fact, the Nebraska court could easily read the inclusion of these items in L.B. 149 as referring to such impoundments and not to in-stream appropriation. Finally, a similar reference to diversion is to be found in the Nebraska constitution.[42]

But, as was the case in Idaho, the constitutional and statutory references to diversion are not necessarily dispositive of the issue of whether L.B. 149 allows in-stream appropriation. For one thing, the negative phraseology of the constitutional and statutory provisions does not *prohibit* appropriation by "application" of water to a beneficial use as well as by diversion of water to such a use. For another, if L.B. 149 were enacted, it would become the legislature's most recent and most specific pronouncement on water rights[43] and thereby would be entitled to additional weight when construed with the now-existing statutory references to diversion.

Since L.B. 149 is subject to amendment, and since, if it is not enacted in the second session of the 85th Legislature, it may be reintroduced as is or as modified in subsequent legislatures, it is perhaps as important to gauge the intent of its supporters as it is to analyze the bill's language. Testimony at the hearing indicated that at least some of the proponents of L.B. 149 expect that the bill would allow for in-stream appropriation[44] and/or minimum

41. *See* text accompanying note 2 *supra.*

42. "The right to *divert* unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest." NEB. CONST. art. XV, § 6 (emphasis added).

43. These rules of statutory construction were employed by the Idaho Supreme Court in State Dept. of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974).

44. *Hearing on L.B. 149 Before the Comm. on Public Works, supra* note 3, at 39 (exhibit H) (statement of Alice Hamilton for the League of Women Voters of Nebraska):

> The term "beneficial use" is not expressly defined in the Statutes. However, the following uses are generally held to be beneficial use: domestic, agricultural, manufacturing, industrial and power. All of these uses involve diverting water from streams.
>
> Water for recreation, fish and wildlife, ground water recharge and storage, waste assimilation and navigation are all in-stream uses and not currently recognized as beneficial use. And yet they benefit the general public.
>
> We believe that this committee should give serious consideration to L.B. 149 to further legislation which would aid in maintaining water in streams for the beneficial use of the people of Nebraska.

stream flows.[45]

V. CONCLUSION

Judging by its current imprecise character in Nebraska law, the concept of beneficial use would appear to benefit from the additional definition offered by L.B. 149.

For one thing, this definition would end any lingering uncertainty in regard to the legal status of appropriations for purposes other than domestic, agricultural, manufacturing or power.

But more importantly, this statutory definition would of necessity focus legislative attention on making some choices among increasingly competitive demands of various users of water. Without some additional definition, choice among these demands may be made, without benefit of public debate or legislative deliberation and guidance, by the Department of Water Resources in a case-to-case approach.

The interests at stake in L.B. 149's definition of beneficial use become especially apparent when the possibility of in-stream appropriation is considered. Surely at this late date the ranks of those interested in in-stream uses, in quality of life and environment generally, are sufficient to secure to them the same opportunity to appropriate water as that currently available to self-interested irrigators and manufacturers.

However, if L.B. 149 is to be expected to carry the load of

45. *Id.* at 47-48 (closing statement of Senator Donald Dworak):

> [T]his is not an attempt to prioritize water. We lose our flexibility if we try and do that, and I don't think we want to lose our flexibility, and I think a good illustration of that right now is the lawsuit that has been filed against the REA by the Nebraska Attorney General, and some of the things mentioned in this lawsuit as to why this particular project shouldn't go ahead, and of course agriculture is listed. Irrigation is listed. But also a minimum stream flows [*sic*], we're talking about. . . . Domestic and agricultural is also mentioned. Certainly we talk in here about requiring the responsible officially detailed statements, among other things, the environmental effects of such action. . . . We talk about fish and wildlife. We talk about the Platte River refuge. These are all items listed in this particular document . . . . Now in a court case, if suddenly we were to say, "Well, this item right here may be the factor that would have won this case in behalf of the State of Nebraska," suddenly prioritized it No. 122nd on the list, in front of the federal court, I think would weaken our case. So very definitely this bill does not try to prioritize.

instituting in-stream appropriation in Nebraska water law, it may be advisable for its proponents to make some adjustments. Prime among these would be an amendment substituting "apply" for "divert" in the appropriation statutes. A similar change in the corresponding language of the state constitution may eventually prove necessary, although its "public interest" proviso may make constitutional amendment unnecessary.[46] Finally, the most direct and certain modification would be to simply insert into L.B. 149, before the references to recreation, fish and wildlife, and navigation, the word "in-stream."

These changes and adoption of L.B. 149 would set the stage for the next, and even more competitive, step in up-dating Nebraska's appropriation law: Determining preferences among various beneficial uses for times when water is in short supply. Without L.B. 149 as modified, or a similar bill, there is a danger that the important uses of water which are in-stream will not be in the preference debate.

T. Edward Icenogle '78

46. *See* note 42 *supra.*